UNIVERSITY OF TORONTO
FACULTY OF LAW

FREEDOM OF EXPRESSION AND THE PRESS

VOLUME 2

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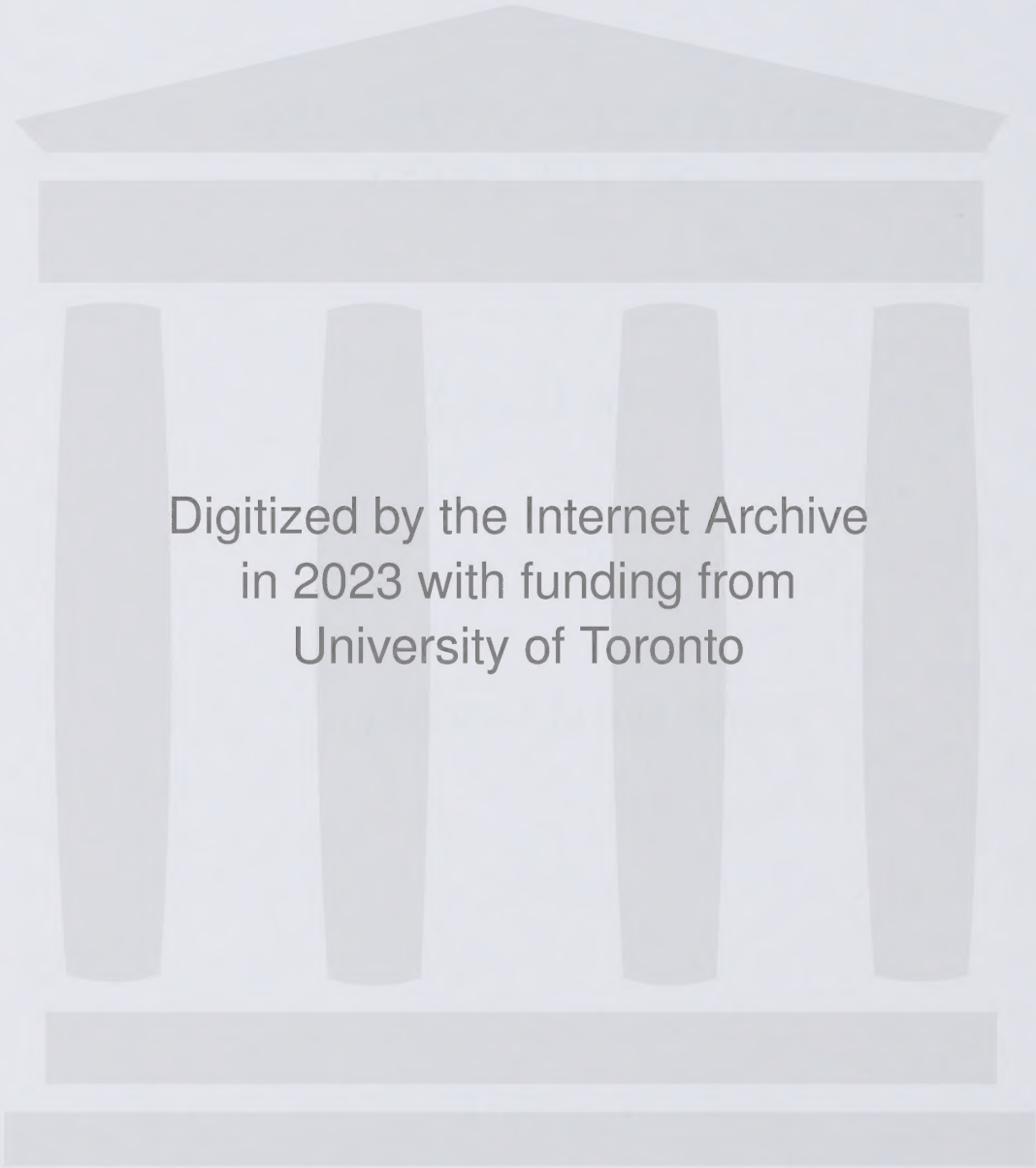

CHAPTER 9
FALSE AND DEFAMATORY EXPRESSION

1. INTRODUCTION

Anglo-Canadian and U.S. statute and common law have traditionally placed great value on a person's good name and reputation. The tort of defamation originated as a common law cause of action, but now is governed by a mixture of common law and statutory provisions. It essentially gives a person a cause of action for damages if a statement is communicated to another about the plaintiff which is false, and which is injurious to his or her reputation. The civil law allows for some defenses. For example, certain statements, uttered in certain circumstances, are protected by either an absolute or qualified privilege. For example, truthful statements cannot give rise to a tort claim. Statements made in open court are absolutely privileged, no matter how defamatory. In addition to the civil action for defamation, the Criminal Code creates a seldom-invoked crime of criminal defamation.

Defamation law presents the vexing question of the state's role in drawing official lines between "truth" and "falsehoods". Defamation proceedings involve contests over whether a publication, broadcast or statement is truthful. This in turn raises the question of who is the appropriate arbitor of "truth" in a free and democratic society whose constitution enshrines freedom of expression as a supreme right? Is this the function of courts, of legislators, or ultimately, of the public alone?

Canadian criminal and civil defamation law evolved over many years, at a time when Canada's constitution included no supreme guarantee of freedom of expression or press. To what extent do the pre-existing civil law of defamation, and the Criminal Code defamation provisions withstand **Charter** scrutiny? While ruling on **Charter** claims in the earliest years of the **Charter**, some Canadian courts have suggested in passing (and at times, in wholly unrelated situations) that defamation law does not infringe upon the freedom of expression (see e.g. the Ontario Court of Appeal in Federal Republic of Germany v. Rauca (1983) 145 D.L.R. (3d) 638, at 655). However, did such courts jump to quickly to a conclusion which is either entirely or at least partially incorrect? The Supreme Court of Canada has not yet squarely considered whether defamation laws as such violate s. 2(b). However, the court unanimously held in its 1992 Zundel decision infra that s. 2(b) protects deliberate falsehoods, when it considered a challenge to a Criminal Code provision which prohibited the deliberate publication of false news injurious to the public interest.

Consider first how U.S. courts have dealt with First Amendment challenges in this area, and then look to the Canadian approach.

CHAPTER 10
CORPORATE AND COMMERCIAL EXPRESSION

1. INTRODUCTION

This Chapter examines the status of commercial expression under the **Charter**. Our law is replete with extensive and intensive regulation of economic activities, aimed at protecting the public and ensuring orderly and fair practices in the economic marketplace. The idea of laisser faire in the sphere of economic and business activities in Canada is, at best, nothing but a fiction, in light of the thousands of pages of statutes and regulations which govern commercial activity. Moreover, the Supreme court of Canada held in Edwards Books and Art Ltd. v. the Queen, [1986] 2 S.C.R. 713 that business regulations do not impinge upon the **Charter's** values.

In this web of commercial regulation one finds a myriad of provisions regulating the form and content of advertising and other communications and activities related to the promotion, marketing, distribution and labelling of goods and services. The question presented in this chapter is whether and to what extent the **Charter** effects the validity of these provisions. Are they to be treated as a mere adjunct of the maze of commercial regulations, or as an unwarranted intrusion into freedom of expression.

This topic compels a vigourous consideration of the purposes for guaranteeing freedom of expression, and the extent to which an unpopular political dissident's speech, which condemns the government of the day, can be constitutionally equated with a television advertisement which explicitly or implicitly suggests that the sponsor's brand of beer will help virile men entice attractive women. It is fair to expect that commercial speech claims will be advanced with business profits at heart, and so the subject also leads to a consideration of how the charter impacts on economic regulation, and economic rights. In this area, the issues which merit consideration include among them the following:

(1) whether **Charter** s. 2(b) confers constitutional rights on corporations;

(2) whether commercial expression is protected by **Charter** s. 2(b), and if so, to what extent?

(3) what is meant by "commercial speech"?

(4) If commercial speech is protected by **Charter** s. 2(b), then what test is to be applied under **Charter** s. 1 to assess limits on commercial expression?

(5) What specific restrictions on commercial speech comply with s. 1?

Although the Supreme Court of Canada concluded that commercial expression is covered by S.2(b) in Ford v. A-G of Quebec, and reinforced that conclusion in Irwin Toy, it is worthwhile nonetheless to question that decision and examine the Court's reasons for extending the **Charter's** protection to pure commercial expression. Accordingly, the materials begin with the s. 2(b) rulings in Ford and Irwin Toy.

The issue which will attract the most attention at present, however, concerns the permissibility of limitations under section 1. The materials under this heading have been divided into four subsections: the first deals with a uniquely Canadian question - the extent to which the

language of commercial expression in the form of commercial signs can be regulated in order to preserve and promote Quebec's linguistic distinctiveness. The second considers regulation of advertising targeted at children. The third addresses regulation of professional advertising and the fourth with restrictions on the solicitation of harmful or immoral conduct. In terms of professional advertising, the Supreme Court of Canada's recent decision in Rocket v. Royal College of Dental Surgeons raises a number of interesting questions. After considering some of those issues, the materials include a recent U.S. Supreme Court decision dealing with questionable advertising practices in the legal profession.

Equally interesting are restrictions on advertisements or the solicitation of activities that are considered harmful or immoral. The Supreme Court of Canada's recent decision upholding Criminal Code provisions prohibiting the solicitation of prostitution requires close examination. That decision is topical, because of its controversial application of s. 1 to the case's facts. The Posadas decision from the U.S. Supreme Court has been included because it deals with the question whether the advertising of an activity can be regulated when the activity itself is legal.

Cases dealing with the status of commercial expression raise an issue that was touched upon in previous chapters; i.e., whether all expressive activity should receive the same protection or whether, on the other hand, it is more appropriate to acknowledge a hierarchy of expressive freedom values. At present in Canada, the Oakes test is said to govern in all cases in which an initial breach of the **Charter** has been found. Is it realistic for the Supreme Court of Canada to cling to the concept of a universal and monolithic standard of justification? That question is particularly relevant in the context of commercial expression.

CHAPTER 11
HATE PROPAGANDA AND RACIST SPEECH IN CANADA

1. INTRODUCTION

This chapter examines the troubling and difficult issues raised by hate propaganda, such as speech that is racist in nature, in the Canadian constitutional context. The following chapter will review the treatment of this issue in the U.S. constitutional jurisprudence.

This is among the most controversial and vexing of all free expression issues. Opponents to hate propaganda laws see this as the litmus test for our courts' commitment to the free speech values about which they speak so grandly in the abstract. Defenders of hate propaganda laws see this as the opportunity for Canadian courts to carve out a uniquely Canadian approach to free expression, which is divorced from perceived U.S. absolutism in this area.

Traditionally, debates over the propriety of speech restrictions in the hate propaganda and pornography fields focused on the immorality or socially harmful nature of such speech. In recent years, the ground on which these debates has shifted, as the proponents of restrictions on hate propaganda and pornography each rest their arguments on equality rights. They contend that proposed speech restrictions are necessary to protect and promote equality rights of women and minorities. In so doing, they take the high ground, and turn the debate into one in which fundamental rights are alleged to clash with each other. Consider how the injection of equality rights and equality rhetoric effects the free expression calculus.

The hate propaganda issue raises a diverse range of free expression questions. Among these are the following:

1. Does s. 2(b) protect all messages, regardless of their content? Should Irwin Toy secure a second look before this question is finally answered?

2. What is hate propaganda? Is this a discrete category of expression which can be adequately defined for legislative purposes?

3. What rationales are appropriate under s. 1 to justify limits on this kind of expression, if it secures s. 2(b) protection?

4. There are different legal tools available to combat this speech, including, for example, criminal laws, human rights legislation, and civil actions. Which of these is constitutionally appropriate?

This chapter will examine the three leading pronouncements in this area from the Supreme Court of Canada. Each decision was handed down after the Supreme Court had ploughed much preliminary free expression terrain in the commercial speech cases, already considered. Each of the following cases considers a different legal tool for addressing hate speech.

R. v. Keegstra, [1990] 3 S.C.R. 697. Here the court considered the validity of s. 319 of the

Criminal Code, which criminalizes the wilful promotion of hatred against identifiable groups based on grounds such as race or religion. In **Taylor et al v. Canadian Human Rights Commission** [1990] 3 S.C.R. 892, the court considered the constitutionality of provisions of the Canadian Human Rights Act which prevent the use of telephones for the dissemination of hate messages. In **R. v. Zundel** [1992] 2 S.C.R. 731, the court ruled on s. 181 of the Criminal Code, an acient provision which bans the deliberate spreading of false news which is injurious to the public interest. The first two charter challenges failed. The third succeeded. Each case found a breach of s. 2(b), and in each case, that finding was unanymous. In each case, there was a strong dissent filed on the application of s. 1 to the law under attack.

In reading these admittedly lengthy decisions, consider whether there are common threads running throughout the various opinions. Consider also whether the outcomes of these cases are consistent, and whether the various members of the court take consistent approaches from one case to the next.

In reviewing these materials, think ahead to upcoming materials on pornography. Contemplate the extent to which arguments regarding free speech and hate propaganda are similar to, or different from, arguments respecting free speech and pornography.

CHAPTER 12
THE EVOLVING AMERICAN APPROACH TO HATE PROPAGANDA LAWS

1. INTRODUCTION

The Canadian cases on hate speech, discussed in the preceeding chapter, refer on a number of occasions to U.S. authority, either to agree or disagree with it. On other occasions, ideas are reflected in the canadian decisions whose roots are American, though no reference to their origin is made. It is therefore informative to consider in some detail the manner in which U.S. courts have dealt with First Amendment challenges to laws which seek to limit hate propaganda.

The American position on hate speech has changed drastically. It began by being very tolerant of laws restricting such expression. Now, it is open to question whether any law, restricting such expression, could survive First Amendment scrutiny.

In reviewing the following U.S. decisions, consider how they are similar to or different from the Canadian jurisprudence. Also, note the change in the treatment of this issue in recent years.

CHAPTER 13
OBSCENITY AND PORNOGRAPHY

1. INTRODUCTION

The question presented in this chapter is whether and to what extent federal or provincial laws may be used to regulate or prohibit speech, films, books, plays videos, music or other forms of communication on the ground that their content is obscene or pornographic. To the extent that the **Charter** allows for laws regulating such materials, the legislative jurisdiction to do so is divided between the federal and provincial governments. The federal parliament has jurisdiction over criminal law, regulation of the broadcast media, and international trade. Provincial legislatures have jurisdiction over property and civil rights in the province, including the regulation of economic activity within the province. This jurisdiction is in turn delegated to some extent to municipalities, whose bylaws often regulate the time, place and substance of commercial transactions within their territorial limits.

The regulation of obscenity and pornography can take many forms. The possession, use, sale, or public exhibition of such materials can be criminalized. Regulatory tribunals such as film censor boards can be empowered to vet films for public exhibition, and can ban or censor such films. Municipal bylaws can limit the regions or zones where obscene or pornographic materials can be sold, or performances can be conducted. Such bylaws can also establish licensing regimes, which govern the content, time and place of the purveyance of such materials. Broadcasting regulatory bodies can establish standards for the content of publicly-broadcasting of such materials, and can make compliance with such standards a condition of licensure. Federal importing regulations can place taxes on the import of pornography, and/or can ban the importation of such materials to Canada.

Before the **Charter** was enacted, there were limited constitutional constraints on the regulation of obscenity or pornography. when the Nova Scotia Board of Censors banned the film "Last Tango in Paris", the Supreme Court of Canada held that this is intra vires the provincial legislature, despite claims that such was a provincial attempt to pass criminal laws. (See Re Nova Scotia Board of Censors and McNeil, [1978] 2 S.C.R. 662). Various municipal bylaws have been challenged on administrative law grounds where they regulate the sale of pornography, though such challenges are governed by domestic common law doctrine.

The challenges to such regulation, when based on freedom of expression claims, rest on the assertion that these regulations are clear examples of content-based regulations of speech or expression. Different arguments have been advanced in defence of these restrictions. Of these, the different rationalia for regulation of these materials tend to justify different definitions of obscenity or pornography.

The key questions presented in this area under the **Charter** include the following:

(1) How should "obscenity" or "pornography" be defined for constitutional purposes?

(2) Is obscenity or pornography protected expression, under **Charter** s. 2(b)?

(3) If so, what kinds of regulations with respect to pornography or obscenity would infringe the freedom of expression, hence requiring justification under **Charter** s. 1?

(4) If some or all regulations on obscenity or pornography violate **Charter** s. 2(b), to what extent are they justifiable under **Charter** s. 1?

CHAPTER 14
THE VENUE OF EXPRESSION - PART ONE THE PUBLIC FORUM

1. INTRODUCTION

The specific free expression topics which have been considered in the preceding chapters have dealt primarily with government efforts at regulating the content of expression. Discussion has focused on such questions as whether communications can be suppressed or regulated where they foster hate against identifiable racial or religious groups, or where they mislead the public about the virtues of a product for sale, or where they deprive a person of his or her good name and reputation in the community.

Attention now turns away from the regulation of the content of expression at large, and towards regulation of the venue of expression. The question presented in this chapter and the next is: where can one engage in expressive activity? Does **Charter** s. 2(b) guarantee to members of the public any right to express themselves on the property of others? If so, on whose property? Where? When? This chapter examines the use of public property as a platform for expressing one's self to the public. This raises the question of the so-called "public forum" The next chapter examines the use of the private property of others to reach one's audience. That pertains to the so-called "quasi-public forum".

The U.S. First Amendment jurisprudence has grappled with these issues for some time. It has evolved a "public forum" doctrine, which provides that the First Amendment guarantees some degree of a right of access to certain publicly owned property to engage in expressive activity. As with all First Amendment issues, a test has evolved respecting the identification of what properties constitute public forums, and what kinds of limits on expression are constitutionally permissible in a public forum. This jurisprudence has been complicated by the advent of claims of access to certain quasi-public private properties, such as shopping malls, for expressive purposes.

In Hague v. C.I.O., 307 U.S. 496 (1939), Justice Roberts of the U.S. Supreme Court made a vital contribution to free speech doctrine. By invalidating ordinances prohibiting assemblies in public areas, he introduced the concept of a "public forum". That concept is one of the foundations of the modern U.S. first amendment doctrine. Essentially, Justice Roberts suggested that the first amendment guarantees citizens some right of access to public property for purposes of engaging in expressive activity. These were his specific words:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

CHAPTER 15
THE VENUE OF EXPRESSION
PART TWO THE QUASI PUBLIC FORUM

1. Introduction

The preceding chapter deals with access to government-owned property. To what extent does **Charter** s. 2(b) guarantee a constitutional right to engage in expressive activity on privately owned property? This issue raises a number of important questions. Is the common law regime of private property itself subject to scrutiny under the Charter? Do government-owned properties which are declared to be open to expressive activity aimed at the public provide enough of an avenue for the average individual or group to reach the public with his, her or its message?

The issue of access to private property for expressive purposes is of particular importance to labour unions. Labour demonstrations often target a specific business or group of businesses with a view to putting economic pressure on them. The earliest significant Supreme Court pronouncement on s. 2(b) arose in such a context, namely the Dolphin Delivery case.

The discussion begins with the pre-Charter Canadian approach to this issue. Then, the frequently-shifting U.S. position is examined. Finally, the limited Canadian Charter jurisprudence is considered.

CHAPTER 16
INTRODUCTION TO
GOVERNMENT REGULATION OF THE MEDIA

1. INTRODUCTION

The preceding chapters have addressed specific free expression topics which generally involve laws which apply to expression by the public generally. Attention now turns in a more focused way over the next few chapters to the **Charter** rights of mass media establishments as an institution within Canada.

In any constitutional regime of freedom of expression, mass media outlets will inevitably play a crucial role. This is because they are essentially in the expression business. They gather information and disseminate it to the public. They have an unparalleled capacity to reach a mass audience -a fact which affects both the importance of their claims to expressive freedom, and claims brought against them for the way in which they exercise that freedom.

Needless to say, many of the topics discussed in previous chapters will be of particular importance to media establishments. Libel laws are invoked more often than not against media defendants. Restrictions on commercial expression will heavily impact on the media, since the media are the main conduit for commercial expression. Restrictions on speech which threatens national security can collide with journalistic news-reporting activity, as most clearly demonstrated in the U.S. Supreme Court's Pentagon Papers decision (New York Times v. U.S., supra Chapter 8).

What is distinctive about the subjects to be covered in the following several chapters is that unlike the materials covered to date, they focus on legal restrictions which are targeted substantially, if not entirely at mass media establishments.

This chapter provides a background to the constitutional issues which follow, by introducing the reader to the print and broadcast media, to the framework for their legal regulation, and to the rationales traditionally proffered for the existence of differential regulatory regimes for the print and broadcast media. The next chapter considers the constitutionality of legal regulations targeted at the ownership of media establishments, and of the regulation of the content of electronic media broadcasts. Thereafter, Chapter XV considers situations where the media is named as a defendant in a free speech case. These are situations where it is alleged that the media has itself infringed the freedom of expression of others.

Next, three chapters are provided which examine constitutional issues pertaining to the openness of Canada's justice system. Chapter XVI examines claims of a constitutional right to attend court proceedings. Chapter XVII examines the constitutionality of restrictions on factual reports about legal proceedings. Then, Chapter XVIII considers the validity of restrictions on criticism of court decisions and judicial behaviour. Open justice is, of course, a topic of concern to all, and not simply to the media. However, it is included in the midst of chapters dealing with specific media topics, because the media is almost always the key litigant in these cases, and because the media plays an essential role in attending and reporting to the public on court cases.

The discussion of specific media topics concludes with Chapter XIX which considers whether and to what extent **Charter** s. 2(b) extends constitutional protection to news gathering activity. This includes an assessment of media claims to constitutional protection for news sources, for access to newsworthy events, and to the filming of news scenes.

There are several themes which should be considered in assessing free speech claims advanced in connection with the media. Among these are the following:

1. What is the function or role of the media within Canada's free and democratic society?

2. Does the **Charter** extend special rights to the media, over and above those enjoyed by the public generally? What is the relationship of the free expression guarantee in s. 2(b) to the free press guarantee in that clause?

3. What is the relative status of the various branches of the media under s. 2(b)? Is it constitutional to treat the print and broadcast media differently under the law?

4. Does the **Charter** impose any duties on the media?